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In The
Supreme Court of the United States

CHARLES WILKIE, et al.,

Petitioners,

v.

HARVEY FRANK ROBBINS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF THE PUBLIC LANDS COUNCIL, NATIONAL CATTLEMEN'S BEEF ASSOCIATION, WYOMING PUBLIC LANDS COALITION, OREGON CATTLEMEN'S ASSOCIATION, AND NEVADA CATTLEMEN'S ASSOCIATION AS *AMICI CURIAE* SUPPORTING RESPONDENT

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STATEMENT OF INTEREST

With the written consent of the parties, reflected in letters on file with the Clerk, Public Lands Council, National Cattlemen's Beef Association, Wyoming Public Lands Coalition, Oregon Cattlemen's Association, and the Nevada Cattlemen's Association submit this brief as *amici curiae* in support of Respondent Harvey Frank Robbins ("Mr. Robbins").[1]

Public Lands Council ("PLC") is an organization of public lands ranchers throughout the West, formed by the National Cattlemen's Beef Association, American Sheep Industry and Association of National Grasslands. PLC's mission is to create and maintain a stable regulatory regime in which its members can operate economically profitable ranches on private and public lands.

National Cattlemen's Beef Association ("NCBA") is the national trade association representing U.S. cattle producers – the largest sector of American agriculture. NCBA works to advance the economic, policy, and social interests of the U.S. cattle business. The protection of private property rights is of critical importance to cattle producers, who often rely upon use of both private and public lands in their business.

Wyoming Public Lands Coalition is an unincorporated affiliation of the Wyoming State Grazing Board, the Wyoming Wool Growers, and the Wyoming Stock Growers organized for the purpose of representing all the federal

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[1] No counsel for a party authored this brief in whole or in part. No person or entity, other than the *amici curiae* and their members, made a monetary contribution to the preparation or submission of this brief.

land permittees in Wyoming on issues such as property rights, grazing permit administration, wildlife, and others. Additionally, members of the coalition provide science-based technical advice on rangeland management issues.

Oregon Cattlemen's Association and Nevada Cattlemen's Association serve as the political and legal voice of the cattle industry in Oregon and Nevada, respectively. A major part of their mission is the protection of the rights of ranchers to make reasonable use of their property.

Amici curiae represent ranchers and cattlemen throughout the United States. These groups interact extensively with the federal government, especially in the Western United States, where public and private lands are often intermingled. There are thousands of ranchers who pay for and rely on the use of public lands to sustain their livelihood and their way of life. By the same token, the government relies on the use of private lands to access and manage public lands. As a result, the relationship between ranchers and the government is usually mutually beneficial. On occasion, however, there is a significant danger that the government will take advantage of its overwhelming power to affect the lives and businesses of ranchers and other property owners. Especially in light of what occurred in this case, *amici curiae* are deeply concerned about the protection of private property rights, and ensuring that adequate safeguards exist to prevent government officials from improperly coercing property owners into relinquishing their rights, or retaliating against individuals who exercise their constitutionally protected property rights.

SUMMARY OF ARGUMENT

This case squarely presents the question of whether property rights are as important, and worthy of protection, as other liberties protected by the Bill of Rights. For the sake of property owners, ranchers, and anyone else who desires to exercise the fundamental rights and liberties protected by our Constitution, the answer to this question must be a resounding "yes."

Mr. Robbins did what any property owner has the right to do when another seeks to use his property: he sought to negotiate the terms and conditions of that use, and when the terms offered were not satisfactory, he said "no." Under normal circumstances, that would end the story. But Petitioners in this case, several Bureau of Land Management ("BLM") officials, did not stop there. Instead, the BLM officials engaged in a pattern of abuse, coercion, and retaliation to obtain rights to Mr. Robbins' land and to punish him for exercising his basic rights as a property owner.

The conflict between the BLM officials and Mr. Robbins highlights the importance of property rights and their protection, for those rights are the foundation of our system of government. The Framers of our Constitution believed that personal freedoms would not exist without protecting property rights from improper government interference. As a result, the Constitution protects the entire bundle of property rights created by state law. The ability to exclude others, including the government, from one's property is one of the most fundamental aspects of property rights. Without the right to exclude, the very idea of property becomes little more than an empty promise.

Recognizing the importance of protecting property rights, the Framers adopted the Fifth Amendment's Takings Clause as a bulwark against improper government interference. The Takings Clause protects property rights, including the right to exclude, by conditioning the government's ability to take private property for public use on providing just compensation. The BLM officials seek to undo this crucial protection by denying relief to property owners whose rights are trampled before an actual taking occurs. They argue that government officials can coerce individuals into giving up their right to demand just compensation, or retaliate against them for exercising their rights, with impunity.

The danger of coercion or retaliation is especially prevalent for ranchers. Ranchers often must negotiate with the government for the use of public land, and in return they must sometimes bargain away the rights over their own lands. In such circumstances, there is a heightened danger that the government will attempt to evade the limitations on taking private property under the guise of negotiation. Absent protections against improper coercion or retaliation, the right to just compensation, as well as the right to exclude others from one's property, will be rendered meaningless. Such an outcome would set a dangerous precedent for property rights and other freedoms protected by the Constitution.

ARGUMENT

I. THE RIGHT TO EXCLUDE IS A FUNDAMENTAL RIGHT IN OUR SOCIETY.

The BLM officials violated the fundamental right of all property owners to exclude others from one's property. Government officials, just like private citizens, must respect the right to exclude. For ranchers like Mr. Robbins, the danger posed by the government's interference with property rights is far greater than that for average citizens because of the intermingled nature of public and private property in the West. The Tenth Circuit appropriately concluded that a remedy must exist when government officials improperly interfere with the constitutionally protected right to exclude outside the eminent domain process, and its decision is consistent with the fundamental nature of property rights in our society.

A. Property Rights and Personal Liberties Have Equal Status Under the Constitution.

Property interests are created by state law. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Once created, the Constitution – particularly the Fifth Amendment – protects the entire bundle of property rights. *See United States v. General Motors Corp.*, 323 U.S. 373, 377-78 (1945).

The Framers of our Constitution recognized that property rights are the foundation upon which our personal freedoms are built. David J. Callis and J. David Breemer, *The Right to Exclude Others from Private Property: A Fundamental Constitutional Right*, 3 Wash. U. J.L. & Pol'y 39, 39-40 (2000) ("Property rights, and particularly rights in land, have always been fundamental to and part

of the preservation of liberty and personal freedom in the United States."). As John Adams said in 1790, "'[p]roperty must be secured . . . or liberty cannot exist.'" James W. Ely, Jr., The Guardian of Every Other Right: A Constitutional History of Property Rights 43 (2d ed. 1998) (*quoting* Discourses on Davila, in Charles Francis Adams, ed., *The Works of John Adams*, 10 vols. (Boston: Little Brown 1851) vol. 6, p. 280); *see also Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226, 236 (1897) ("'[a]lmost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen.'") (citations omitted).

The Fifth Amendment embodies the intention of the Framers to protect property rights as much as other basic personal freedoms. The Amendment protects against double-jeopardy, self-incrimination, and the deprivation of "life, liberty, or property" without due process of law. U.S. Const. amend. V. Immediately following these important protections, the Fifth Amendment states: "nor shall private property be taken for public use, without just compensation." *Id.* This proclamation enshrines the critical right of property owners to exclude the government from their property, or to demand compensation if the government refuses. The Takings Clause does not, by implication or otherwise, empower or authorize the government to take private property through any other means. In the most basic terms, the Takings Clause "conditions the otherwise unrestrained power of the sovereign to expropriate, without compensation, whatever it needs." *General Motors Corp.*, 323 U.S. at 377.

The decision to include the Takings Clause alongside basic personal freedoms against self-incrimination, double jeopardy, and the deprivation of life, liberty or property

without due process of law demonstrates the close connection between personal liberty and property rights. James W. Ely, Jr., The Guardian of Every Other Right: A Constitutional History of Property Rights 54 (2d ed. 1998). It should come as no surprise that people need "security against both arbitrary punishment and deprivation of property." *Id.* Mr. Robbins' odyssey amply demonstrates that principle.

B. The Fifth Amendment Protects the Right to Exclude Others, Including the Government, From Private Property.

The Fifth Amendment undeniably protects the right of property owners to exclude others, "especially the Government," from their property. *See, e.g.*, *Hendler v. United States*, 952 F.2d 1364, 1374-75 (Fed. Cir. 1991). This Court has "repeatedly held that . . . 'the right to exclude [others is] one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831 (1987) (*quoting Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433, 435-36 (1982) ("The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights."), *and Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)). In fact, the "'right to exclude' [is] universally held to be a fundamental element of the property right." *Kaiser Aetna*, 444 U.S. at 179-80. *See also Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994). Thus, if the government takes away the right to exclude, it owes compensation. *Kaiser Aetna*, 444 U.S. at 179-80. In light of its importance, courts must "tenaciously guard[]" the right to exclude. *Cable Holdings of Georgia, Inc. v. McNeil Real Estate*

Fund VI, LTD, 953 F.2d 600, 605 (11th Cir. 1992), *cert. denied*, 506 U.S. 862 (1992).

On numerous occasions, this Court has been called upon to prevent the government's attempt to evade the Fifth Amendment's limitations after it took away the property owner's right to exclude. For example, this Court has found that a compensable taking occurred when the government or municipalities: built a road over private land to allow the public access to a reservoir, *Leo Sheep Co. v. United States*, 440 U.S. 668, 678 (1979); conditioned building permits on the grant of an easement, *Nollan*, 483 U.S. 825, and *Dolan*, 512 U.S. 374; required property owners to allow cable boxes on their buildings, *Loretto*, 458 U.S. 419; and attempted to declare that a privately owned pond was a navigable water subject to public use after the owners dredged it, *Kaiser Aetna*, 444 U.S. at 180.

In this case, the BLM officials attempted to evade the just compensation requirement of the Fifth Amendment through coercion, and they retaliated against Mr. Robbins for exercising his right to exclude. Despite the fact that Mr. Robbins did not give in to the coercion and retaliation – and, therefore, no taking occurred – the BLM officials nevertheless violated his right to exclude. To deny a right of recovery under these circumstances would essentially eviscerate the Fifth Amendment's limitations on the government's power to take private property, and expose property owners to unlawful conduct for the exercise of their basic constitutional rights.

II. THE FIFTH AMENDMENT PROHIBITS THE GOVERNMENT FROM COERCING PROPERTY OWNERS INTO GIVING UP THEIR RIGHT TO JUST COMPENSATION.

As this Court has recognized, "[m]any of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities, and the Just Compensation Clause of the Fifth Amendment is one of them." *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 321 (1987). The Fifth Amendment is a broad guarantee of private property rights, and it significantly limits the government's ability to interfere with such rights. U.S. Const. amend. V; *see also General Motors Corp.*, 323 U.S. at 377. "If the right to exclude means anything, it must include the right to prevent the government from gaining an ownership interest in one's property outside the procedures of the Takings Clause." *Robbins v. Wilkie*, 433 F.3d 755, 766 (10th Cir. 2006).

Despite this clear mandate, the BLM officials would have this Court believe that the Fifth Amendment's prohibition on taking private property is so narrow that it can be evaded with ease. They contend that federal officials are free to coerce property owners into giving up their rights. In their view, so long as no taking occurs, the Fifth Amendment presents no obstacle to such strong-arm tactics. This Court should reject the BLM officials' invitation to apply such an unduly restrictive view of the Fifth Amendment in this case.

A. The Doctrine of "Unconstitutional Conditions" Prohibits the Government From Coercing a Property Owner into Giving Up Protected Property Rights.

This Court has previously recognized, and rejected, the potential power to extort property interests. For example, in *Nollan*, a municipality conditioned a building permit on the property owners' willingness to provide a public easement across their property. This Court stated that "unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.'" 483 U.S. at 837 (citations omitted). Likewise, in *Dolan*, the Court reiterated the inability of the government to place "unconstitutional conditions" on government benefits, such as the waiver or relinquishment of the right to just compensation in exchange for a discretionary benefit that has little or no relationship to the property at issue. 512 U.S. at 385.

These cases confirm the common-sense principle that the government cannot coerce or extort a property owner into giving up certain property rights. Although the cases arose in the context of the government attempting to place unconstitutional conditions on certain benefits through its regulatory authority, the doctrine cannot be limited to that context. If the government cannot extort a property interest through regulation, then it should go without saying that the government is prohibited from extortion through other means outside of the official regulatory process, such as using threats, intimidation, or other wrongful acts to achieve its purpose. Without protection against coercion, the right to exclude and the right to just compensation are worthless, yet that is the precise result

the BLM officials seek in this case. What happened to Mr. Robbins exemplifies the danger of government officials attempting to place unconstitutional conditions, through improper conduct, on the exercise of a basic constitutional right.

B. The Right to Exclude May Be Violated Regardless of Whether an Actual Taking Occurs.

The BLM officials argue that because they did not successfully extort or coerce Mr. Robbins into giving up a property interest, he has no remedy for their egregious and improper conduct, all of which damaged him and his business. Of course, had the BLM officials succeeded in their plan, Mr. Robbins still would be without a remedy because he would have "voluntarily" negotiated away his rights. The Court should reject this "Catch-22" argument and protect property owners from coercion, regardless of whether an actual taking occurs. Mr. Robbins' saga amply demonstrates the danger of coercion in the ranching context.

The road to Mr. Robbins' ranch crosses some of his own land, as well as public lands. When he bought the ranch, Mr. Robbins had a right-of-way over the public lands, but the BLM did not properly record an easement negotiated with the prior landowner for use of the road over Mr. Robbins' property. Mr. Robbins was willing to negotiate an equivalent right-of-way for the BLM, but the BLM wanted no such negotiation. J.A. 123 (former BLM official testified that BLM officials "wouldn't negotiate" with Mr. Robbins). The BLM proposed an irrevocable, 20-year easement that would allow the BLM, its assigns and licensees "full use" of the road as it passed over

Mr. Robbins' land, subject to some restrictions on mineral development. J.A. 86-87. In exchange, Mr. Robbins could keep his existing right-of-way to use the same road as it passed over federal lands, though he would need to pay the BLM fair market value ("reduced" in exchange for his grant of an easement to the BLM), have limited ability to use and maintain the road, and give the BLM the authority to revoke the right-of-way. J.A. 94, 97-103. Not surprisingly, Mr. Robbins concluded that the right-of-way and proposed easement were not reciprocal and that more negotiation was warranted.

Rather than negotiate, however, the BLM officials began a campaign to "bury" Mr. Robbins in an effort to coerce him into giving up more rights than could be justified under the pertinent regulations. Pet. App. 29a. In other words, they wanted Mr. Robbins to give up his property rights to evade the just compensation requirement of the Fifth Amendment, and they had the means to accomplish that goal. Knowing that Mr. Robbins needed access to public lands for his livelihood, they cancelled his grazing and special use permits on false pretenses. *See* J.A. 124 (former BLM official testified that he was asked to look into potential range violations by Mr. Robbins even though "he didn't have a range problem[] with Mr. Robbins."). They also refused to maintain the road so that Mr. Robbins could access his land; threatened to cancel Mr. Robbins' right-of-way over the federal land unless he granted the BLM an easement over his land, and later cancelled the right of way; bragged they were going to "bury Frank Robbins;" falsely accused him of a crime; trespassed on his land; and harassed his guests. Pet. App. 29a-30a. Essentially, they targeted him for different treatment as a way of coercing a property interest. *See*

J.A. 127, 129 (in response to a question as to whether the BLM treated Mr. Robbins different than other permittees, a former BLM official testified, "Of course he was." He later explained that he was asked to "spend more time there, look closer, watch closer, investigate harder.").

Thus, contrary to the BLM officials' argument, Mr. Robbins' case is not based upon the wrongful denial of his access to public lands. (Pet. Br. at 44.) Instead, he claims that the BLM officials placed an "unconstitutional condition" on his use of public lands, *i.e.*, the waiver and relinquishment of his right to demand an equivalent easement over public lands, or to demand just compensation. Further, as the above laundry list indicates, the BLM officials did much more than merely interfere with Mr. Robbins' use of public lands – they substantially interfered with the use of his own land.

If the Court accepts the BLM's invitation to prohibit a remedy for even the most outrageous violations of the right to exclude simply because an actual taking did not occur, then the Fifth Amendment's "guarantee" of just compensation is an empty promise. Unscrupulous government officials, or even those who have the best of intentions, can too easily evade the requirement for just compensation through coercion, extortion, abuse or harassment, and that is exactly what happened to Mr. Robbins. J.A. 125 (former BLM official testified that "people given authority and not being held in check and not having solid convictions will run amuck and that it [sic] was I saw happening" to Mr. Robbins). The Court should therefore confirm the Tenth Circuit's view that the government cannot interfere with property rights except by exercising its legitimate authority under the Takings Clause.

C. Ranchers Face a Heightened Danger of Unlawful Coercion.

The danger of coercion is heightened in situations where property owners must regularly negotiate with the government for the use of public lands, as the government will often have an interest in obtaining rights to the owner's private lands. *See Nollan*, 483 U.S. at 841 (when the government seeks to condition certain benefits on the provision of an easement, there is a "heightened risk" that the government may seek more than it is otherwise entitled to in an attempt to avoid the compensation requirement of the Fifth Amendment). What appears to be a simple negotiation may be nothing more than a plan of extortion to obtain property interests without paying just compensation. *Id.* at 837 ("The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation.").

As this case demonstrates, the ability of the government to manage the public lands is too easily manipulated into a justification for improper conduct. The record does not support the BLM officials' benign characterization of their conduct as merely seeking a reciprocal easement to manage public lands pursuant to their regulatory authority. Instead, the facts adduced below show a pattern of behavior, not justified by any regulation or other authority, designed to coerce Mr. Robbins into acceding to the BLM officials' demands for an easement.

Normally, reciprocity interests and bona fide negotiations will allow property owners and the government to avoid these types of disputes. *Leo Sheep*, 440 U.S. at 681. However, as *Leo Sheep* demonstrates, there are times

when the government will refuse to negotiate in good faith and attempt to take private land without paying just compensation. In *Leo Sheep*, the government attempted to negotiate with a property owner to develop a road across private land to allow the public access to a reservoir. 440 U.S. at 678. When negotiations failed, the government simply built the road across both private and public lands, but it did so without exercising its eminent domain power. *Id.* The property owners sued the government to quiet title, and this Court ultimately agreed that the government had effected a taking that required just compensation. *Id.* at 687-88.

In the BLM officials' view, if the government had threatened or coerced the property owners in *Leo Sheep* into agreeing to the road over their land without any payment, that would be permissible. They fail to explain, however, why the government should be able to obtain through threats or improper conduct what it is otherwise prohibited from obtaining without the payment of just compensation.

D. A *Bivens* Remedy Is Needed to Prevent Government Officials From Abusing Property Rights Outside of the Eminent Domain Process.

Under the BLM officials' view, there is no remedy for their egregious conduct toward Mr. Robbins. They contend that federal officials are not empowered to effect a taking and thus cannot trigger the just compensation requirement. (Pet. Br. at 29, 41-42.) They further contend that the Administrative Procedures Act precludes relief for those

actions not subject to agency review. (*Id.* at 34-35.) That is exactly why a *Bivens* remedy is needed. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). The BLM officials' protestations against a *Bivens* remedy are based in part on the contention that such a remedy will inhibit government officials from doing their job or negotiating reciprocal interests. (Pet. Br. at 39.) Of course, they fail to acknowledge the laundry list of inappropriate conduct described above, or the realities of the situation. The BLM officials ask this Court to assume that negotiations between the BLM and private landowners are identical to negotiations between two private citizens. This Court rejected such an argument in *Bivens*, aptly stating:

> Respondents seek to treat the relationship between a citizen and a federal agent unconstitutionally exercising his authority as no different from the relationship between two private citizens. In so doing, they ignore the fact that power, once granted, does not disappear like a magic gift when it is wrongfully used. An agent acting – albeit unconstitutionally – in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own.

Bivens, 403 U.S. at 391-92. When federal officials are involved, private citizens may not be able to resist what the official wants. *Id.* at 395. Absent a check on authority, government agents may run rampant over private landowners' constitutionally protected property rights. *See* J.A. 132 (former BLM official warned Mr. Robbins that if he fought with the BLM, it would be a war, and the BLM would "outlast him and outspend him."). Those rights must be protected, whether in the context of an actual

taking (through just compensation) or through improper coercive conduct designed to evade the just compensation requirement.

This Court's decisions in *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), and *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), do not, as the BLM officials contend, support the conclusion that a deprivation of constitutionally protected rights is unprotected absent an actual taking of property. (Pet. Br. at 42.) In *Williamson*, the Court concluded that a takings or due process violation claim was not yet ripe because the property owner had not exhausted all potential remedies, such as seeking a variance to a zoning code. However, that case "did not establish that compensation is unavailable for government activity occurring before compensation is actually denied." *First English Evangelical Lutheran Church of Glendale*, 482 U.S. at 320 n.10.

In *Ruckelshaus*, the Court refused to enjoin a potential taking that was "duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking." 467 U.S. at 1016 (footnote omitted). Here, on the other hand, Mr. Robbins asserts that the BLM officials did not take actions that were authorized by law (such as trespassing on his land, inciting disputes with his neighbors, cancelling his permits on false pretenses, bringing false criminal charges against him, and videotaping guests on his ranch), nor can he bring a suit for just compensation because he was able to withstand their efforts to coerce a taking of his property. Despite his successful resistance, however, Mr. Robbins has suffered great harm due to the exercise of his constitutional rights.

Therefore, the Tenth Circuit appropriately concluded that the Fifth Amendment prohibits government officials from attempting to evade the requirement to pay just compensation for taking private property through coercion. Contrary to the BLM officials' view, the just compensation requirement does not merely protect the right to exclude others only *after* a taking has occurred. If the Court reverses the Tenth Circuit, it will send the signal that it is acceptable to extort property rights and thereby substantially diminish one of the most significant protections afforded by the Constitution.

III. THE COURT MUST PROTECT INDIVIDUALS WHO ASSERT THEIR CONSTITUTIONAL RIGHTS FROM GOVERNMENT RETALIATION.

Just as the government or its officials may not coerce a property owner into giving up his or her rights, they must also be prohibited from retaliating against people for exercising their Fifth Amendment rights. A property owner should be able to exclude the government from his property without fear of repercussions.

A. Like the First Amendment, the Fifth Amendment Protects Against Retaliation.

Even though retaliation is not expressly referenced in the Constitution, courts protect against it because "[r]etaliatory actions may tend to chill individuals' exercise of constitutional rights." *American Civil Liberties Union of Maryland, Inc. v. Wicomico County*, 999 F.2d 780, 785 (4th Cir. 1993) (*citing Perry v. Sindermann*, 408 U.S. 593, 597 (1972)). The BLM agents concede that protections exist against retaliation for the exercise of First Amendment

rights, and that the Fifth and First Amendments are "of course entitled to equal footing." (Pet. Br. at 38.) Nevertheless, they urge this Court to place the First and Fifth Amendments on unequal footing by limiting anti-retaliation protections to the First Amendment context. Such an argument is inconsistent with this Court's precedent, and would open a Pandora's Box in terms of interpreting and enforcing the freedoms protected by the Bill of Rights.

Thankfully, this Court has already rejected the idea that the Fifth Amendment is entitled to lesser status than the First: "We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances." *Dolan*, 512 U.S. at 392. It is true that the First and Fifth Amendments protect different interests. But there is no basis to suggest that one interest is more important than the other. Indeed, a two-tiered approach to constitutional rights – in which the exercise of some rights is worthy of protection, whereas the exercise of others is not – would weaken the entire fabric of the Constitution. *See Block v. Hirsh*, 256 U.S. 135, 160 (1921) (McKenna, J., dissenting) ("The 'strength of the fabric' [of the Constitution] cannot be assigned to any one provision, it is the contribution of all, and therefore it is not the expression of too much anxiety to declare that a violation of any of its prohibitions is an evil – an evil in the circumstance of violation, of greater evil because of its example and malign instruction.").

Just as in the First Amendment context, the failure to protect against retaliation would likely inhibit property owners from exercising their constitutionally protected

right to exclude the government from their property, or to demand just compensation. *See Wicomico County*, 999 F.2d at 785. Further, even though the Fifth Amendment contemplates some degree of interference with property rights, that alone does not indicate that the "right to exclude" is entitled to some lesser degree of protection. Instead, the express limits placed on the manner in which the government may interfere with private property rights suggests that any other type of interference must be prohibited. Certainly the Framers did not imagine that the Constitution would permit the forced relinquishment of a right enshrined in the Bill of Rights.

Therefore, although certain actions – such as penalizing a rancher for a minor infraction of a grazing permit – might otherwise be acceptable, when those actions are taken for the purpose of punishing an individual for exercising his constitutionally protected rights, the courts must provide a remedy. *DeLoach v. Bevers*, 922 F.2d 618, 620 (10th Cir. 1990). Just as a government employee could not be fired for speaking out on a matter of public concern, a property owner should not be punished for exercising the right to exclude, regardless of how that right is exercised.

By negotiating a right-of-way, an equivalent easement, a reciprocal easement, or other aspects common to ranchers who interact with government officials, ranchers are exercising their Fifth Amendment rights. If they had no right to exclude others, and no right to just compensation, there would be no impetus for negotiation – the government would simply take what it wanted. Therefore, the First Amendment will not necessarily protect those ranchers whose only "crime" is to negotiate with the government, as is their right under the Fifth Amendment.

B. The Right to Exclude Includes the Ability to Say "No" to the Government.

As set forth above, the right to exclude, if it is to have any meaning at all, must include more than the ability to demand just compensation after a taking has occurred. At a minimum, if the government seeks to impose unconstitutional conditions on the grant of a permit or right-of-way, or otherwise attempts to coerce an owner into giving up the right to just compensation, the property owner must be entitled to say "no" without fear of repercussions. Without such a basic guarantee, the right to exclude will be meaningless.

The ability to exercise the right to exclude without fear of retaliation is critical to those who must regularly interact and negotiate with the government due to intermingled public and private lands. Property owners must have the ability to force the government to exercise its eminent domain powers when appropriate. Otherwise, the possibility for bona fide negotiations between private property owners and the government will be substantially diminished, and the fundamental right to exclude others will have no substance.

IV. RECOGNIZING A RETALIATION CLAIM WILL FURTHER IMPORTANT PUBLIC POLICY GOALS.

Lastly, the BLM officials contend, without any support, that recognizing a cause of action for retaliation under these circumstances will "upset the legitimate give and take" that occurs between landowners and government officials, implying that federal officials will be exposed to too much potential liability for doing their job. (Pet. Br. at 39.) Nothing could be further from the truth.

The facts involved in this case are unusual and egregious. As this Court stated in *Leo Sheep*, "[i]t is some testament to common sense that the present case is virtually unprecedented, and that in the 117 years since the [land] grants were made, litigation over access questions generally has been rare." 440 U.S. at 686-87. There are thousands of ranchers using public lands, and many or most of them regularly interact with federal officials related to the reciprocal uses of public and private lands. The BLM officials suggest that recognizing a claim here will inhibit officials from doing their job, but that is not the case. It is not a BLM official's "job" to trespass on ranchers' land, videotape their guests, incite arguments with their neighbors, or threaten to "bury" them. Recognizing a claim here merely acknowledges the potential for government abuse, which does occur from time to time, and ensures that there will be a remedy when government officials go too far.

Even assuming that recognizing a cause of action might result in additional claims, some meritorious and some not, that is no basis for refusing to guard against the violation of constitutional rights. *Breen v. Kahl*, 419 F.2d 1034, 1038 (7th Cir. 1969) ("To fail to hold such arbitrary regulations unconstitutional because of fear of opening the floodgates to litigation, some meritorious and some not, would be an abdication of the judiciary's role of final arbiter of the validity of all laws, and protector of the people, young and old, from the governmental exercise of unconstitutional power."), *cert. denied*, 398 U.S. 937 (1970). Therefore, this Court should reject the BLM officials' suggestion that recognizing a claim under these circumstances will inhibit the BLM officials from doing their job. The Court must protect against the intentional and

egregious violation of Mr. Robbins' basic constitutional rights.

CONCLUSION

The Court should affirm the Tenth Circuit's judgment and the case should be remanded for a trial on the merits.

Respectfully submitted,

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